85-734 (1)

FILED
OCT 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HORACE E. BRESSLER, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

William Dee Morris*
P.O. Box 4425
Missoula, MT 59806
(406)721-3257

Jeffrey Lee Shrom
P.O. Box 4425
Missoula, MT 59806
(406)721-3257

ATTORNEYS FOR PETITIONER
*Counsel of Record

---

(62)

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Petitioner was convicted after a jury trial of willfully failing to file income tax returns in violation of 26 U.S.C. Section 7203 (Count I and III) and of willfully evading a substantial tax liability in violation of 26 U.S.C. Section 7201 (Count II). Defendant timely appealed and brought up for the first time at oral argument an objection to the trial court's jury instruction 37 A. The objection advanced at oral argument asserted that jury instruction 37 A was inadequate in that the instruction misrepresented the law by setting up an "objectively reasonable" standard for the jury to consider in determining Defendant's good faith misunderstanding of the law and that under the circumstances

of this case the misrepresentation constituted plain error and a retrial should be ordered. The Appeals Court affirmed, thus raising the following questions for this Court's consideration: Is a jury instruction in a criminal tax case which limits a "good faith misunderstanding of the law defense" to a misunderstanding that is "objectively" reasonable a misrepresentation of the law, and if it is, did it constitute plain error under the circumstances of this case?

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1985

HORACE E. BRESSLER, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A writ of certiorari is respectfully sought to review the Court of Appeals Order affirming the conviction of the Petitioner is a criminal case entered on July 17, 1984.

TABLE OF CONTENTS AND AUTHORITIES

Page

Questions Presented

Table of Contents and Authorities . . i

Opinions Below. 1

Statement of Jurisdiction 2

Statutes and Constitutional Provisions Involved. 3

Statement of the Case 5

Argument

1. Jury Instruction 12

2. Plain Error. 18

3. Reasons for Granting the Writ. 26

Conclusion

Cases:

Filippon v. Albion Vein State Co., 250 U.S. 76, 63 24

Sandstrom v. Montana 442 U.S. 510 25

United States v. Aitken 755 F. 2d 188 (1st Cir. 1985). . . 9, 15, 10, 17, 22, 26

United States v. Bressler, Slip. Op. No. 84-2680 at 5.. . . .19, 20, 21

United States v. Burton,
737 F. 2d, 439 (5th Cir. 1984) . . 16

Cooley v. United States,
501 F.2d 1249 at 1253 (1975) . . . 17

United States v. Goetz,
746 F.2d 705 (11th Cir. 1984). . . 16

United States v. Krager,
711 F.2d 400 at 405 (1979) 17

Kruelwitoh v. United States,
336, U.S. 440, 93 L.Ed. 790. . . . 22

Mann v. United States,
319 F.2d 404 at 409, 410 (1964) . .17

United States v. Moore,
627 F.2d 830 (1980). . .9, 12, 13,14,
15, 19

United States v. Pomponio,
429, U.S. 10, 97 S.Ct. 22. 22

United States v. Ware,
608 F.2d 400 at 405 (1979) 17

United States v. Witvoet,
767 F.2d 338 (1985) . . . 13, 14, 18
19, 20

Attachments

Appendix A 29

Appendix B 32

Appendix C 38

Appendix D 41

Appendix E 42

Appendix F 43

Appendix G 44

Appendix H 45

Appendix I 46

Appendix J 47

OPINION BELOW

The order and judgement of the Court of Appeals for the Seventh Circuit filed August 27, 1985 affirming the conviction of the Defendant Horace E. Bressler on all three counts of a three count indictment.

United States v. Bressler, slip op. No. 84- 2680 (Aug. 27, 1985).

STATEMENT OF JURISDICTION

Date of Judgement: August 27, 1985

Statutory provision conferring jurisdiction of this court:

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

A. The Federal Rules of Criminal Procedure.

Rule 52. Harmless Error and Plain Error.

(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain error. Plain errors or defects affecting substantial rights may be notice although they were not brought to the attention of the court. (Dec. 26, 1944, eff. Mar. 21, 1946.)

B. The United States Constitution.

ARTICLE V

No person shall be held to to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled

in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

STATEMENT OF THE CASE

Defendant Horace E. Bressler was convicted after a jury trial of two counts (Counts I and III) of willfully failing to file his income tax returns for taxable years 1977 and 1978, in violation of 26 U.S.C. Section 7203 and one count (Count II) of willfully evading a substantial tax liability for 1978, in violation of 26 U.S.C. Section 7201. Defendant timely appealed and the Appeal's Court had jurisdiction pursuant to 18 U.S.C. Section 3231 (subject matter) and 28 U.S.C. Section 1291.

Evidence and testimony at trial showed Defendant had substantial gross income from several sources during the tax years in question, 1977 and 1978. There was also evidence that defendant had transferred property

to his son for less than fair market value (Tr. 1121-1122).

The government called witnesses that testified about various statements the defendant had made in public on the subject of income tax. For example, Anne Fitzhenry, a reporter, attended a meeting where, according to her testimony, the Defendant made the following remarks in public; Defendant admitted he had not filed a tax return for thirteen years; that paying income tax was voluntary; that the American people were dumb, dumb, dumb for filing tax returns; that a person's chance of getting caught for failure to file tax returns was slim; and that one could make oneself judgment proof; [TR p.325, ln. 16; pp. 336-337, lns. 20-25; p. 349, lns. 10-25; pp. 350 lns. 6-7, 13-15]. The Defendant testified in his own defense that he believed

the income tax was voluntary and that he, in good faith, did not believe he violated the law [TR pp. 1096-1097, p. 1118, p. 1127]. Defendant also presented character witnesses that testified as to his honest character and Defendant introduced some evidence through his expert witness Joyce Jones that he would have had little if any tax liability for the years in question and may have had a credit due [TR p. 1213, lns. 20-24; p. 1214, lns. 12-18]. Rick Schmidt, a special agent of the IRS, and a government witness testified that Defendant did not believe he would owe any tax [TR p. 360, ln. 14] and that because of his deductions and expenses Defendant would not have a tax liability [TR p. 368, lns 20-25]. Defendant was not represented by counsel at trial because he refused

court appointed counsel. However, the Court did allow two lay persons to sit at counsel table with Defendant to advise him and standby counsel was present through out the trial to assist Defendant if Defendant should so desire.

At the close of the case the Trial Court, through Jury Instruction 37A, instructed the jury in pertinent part that "...a good faith misunderstanding of the law may negate willfullness if the misunderstanding is reasonable." [TR 1355]. Defendant timely appealed his conviction and filed his Opening Brief on February 1, 1985 [App., p. 43] and his reply brief on April 18, 1985 [App., p. 44]. In his opening brief Defendant did not raise any issues now before this court. For the first time, at oral argument Defendant raised his objection to the Trial Court's

good faith jury instruction based on United States v. Aitken, 755 F.2d 188 (1st Cir. Feb. 25, 1985).

Oral argument took place on May 24, 1985 and at that time Defendant's counsel informed the Court that he had not raised the issue in his opening brief because controlling precedent in the Seventh Circuit was established in United States v. Moore, 627 F.2d 830 (7th Cir. 1980) and that Moore, supra, had been cited so many times with approval in the Seventh Circuit that until United States v. Aitken, supra, had been decided no case on point creating a conflict in the circuits on which counsel could base an argument for a change in precedent. Counsel explained that Aitken, supra, was not available in the Missoula Law Library until after research for the

appeal had been completed, and that counsel had been away from his office and out of state when he first learned of the Aitken decision on May 21,1985 and was bringing up the issue at the earliest opportunity (these statements were also repeated in Defendants Supplemental Reply Brief, pp. 3-4 [App., p. 45].

The Court ordered the government to file a supplemental brief on this issue which the government did on June 28, 1985. Defendant served a reply to the government's Supplemental Brief on July 15, 1985, [App., p. 47], but was informed by the Appeals Court that the brief would not be officially filed before Defendant submitted a motion for leave to file it, which Defendant served on August 5, 1985 [App., p. 46].

The Appeals Court panel deciding the case did not consider Defendant's reply brief before deciding the case because the Appeal panel had not become aware of the brief until after the Appeals Court had made their decision. Nor was the Court apparently aware of the fact that Defendant had original-tried to file his brief on July 15, 1985 and then again on August 5, 1985. [App., p.46]. The Appeals Court affirmed the Defendant's conviction finding the jury instruction proper and even if the instruction would have been improper the Appeals Court ruled the error harmless.

ARGUMENT

1. Jury Instruction.

At the close of the evidence the Trial Court Judge gave in pertinent part the following instruction to the jury to assist them in their determination of Defendant's good faith misunderstanding of the law defense:

> A good faith misunderstanding of the law may negate willfulness if the misunderstanding is reasonable. However, mere disagreement with the law does not constitute such a misunderstanding nor a defense....

On its face this instruction misrepresents the law as it sets up an "objective" standard for the jury to use in their determination of guilt or innocence. In affirming the Defendant's conviction the Seventh Circuit Court of Appeals relied on the Seventh Circuit case United States v. Moore, 627 F.2d

830 (1980) and a more recent Seventh Circuit case United States v. Witvoet, 767 F.2d 338 (1985).

In Moore, supra, at 383 the District Court instructed the jury that willfulness in connection with tax crimes means a voluntary, intentional violation of a known legal duty and the Appeals Court need not have given any other instruction. The District Court apparently must have concluded that Moore's defense was based on mistake of law. Recognizing that mistake of law is an extremely limited defense the District Court went on to instruct the jury that Mr. Moore's belief that he had filed a proper income tax must be a reasonable belief. In pertinent part the instruction read:

> "The question is, did he reasonably believe that they [the returns]...were Mr. Moore's theory

> that during the time which he he was required to file these returns...he did timely (file) what he then reasonably believed to be a proper return...and he did not, therefore, willfully fail to file a proper return. Moore, supra, at 833.

The Appeals Court in approving this instruction and affirming Mr. Moore's conviction concluded that the mistake of law defense is extremely limited and the mistake must be objectively reasonable. The Moore Court relied on other circuit court cases to reach this conclusion.

Moore, supra, has been precedent in the Seventh Circuit for over half a decade and here the Appeals Court relied on it and the more recent Seventh Circuit case United States v. Witvoet, supra, in determining that a good faith misunderstanding of the law most still be objectively reasonable in the Seventh Circuit.

Since the Seventh Circuit's Moore, supra, decision, a conflict in the circuits has developed that was accurately articulated where the Appeals Court states:

> Subsequently, the court gave an instruction stressing that sincerety and good motive are not enough to constitute lack of willfulness. "There has to be a mistake concerning the requirements of the law, a mistake that is objectively reasonable in order to say that particular conduct is not willful conduct...."

The Aitken Court rejected the "objectively reasonable" test while recognizing that Moore, supra, supported it.

> ...it could be argued that the District Court Judge should not have been expected to recognize the error sua sponte. The government, after all, cited to the Court the Seventh Circuit's case, United States v. Moore, which supports the "reasonableness" instruction, even though it did not begin to reflect the overall state of the law on willfulness....
>
> The First Circuit isn't the only

circuit that has rejected the "objectively reasonable" standard in regard to a good faith misunderstanding of the law. These Appeal Courts recognized that while "mistake of law" is a limited defense it is at its broadest in criminal tax cases. Some circuits have seen the application of the "objectively reasonable" standard deny a criminal defendant access to the witness stand and they have rejected the objective test. (See United States v. Burton, 737 F.2d 439 (5th Cir. 1984); United States v. Goetz, 746 F.2d 705 (11th Cir. 1984) and

Other circuits have not ruled directly on the issue but have implied that in tax cases the Seventh Circuit District Court Judge Shadur stated that,

> ...what is "known" necessarily depends on a person's state of mind, and it is here that the debate as to objective versus subjective states of mind arises. Indeed it is misleading to call that a "debate," for Aitken (cited in the text) discloses the contest is rather one between our Court of Appeals on the one side and the rest of the legal world on the other.... Wojtas, supra, footnote 1 of the Appendix, p.2.

The case most directly on point and in conflict is United States v. Aitken, 755 F.2d 188 (1st Cir. 1985). The test should be "subjective" good faith rather than the Seventh Circuit's "objective" good faith standard. See United States v. Kraeger, 711 F.2d 6 at 7 (1983); United States v. Ware, 608 F.2d 400 at 405 (1979); Mann v. United States, 319 F.2d 404 at 409, 410 (1964) and Cooley v. United States, 501 F.2d 1249 at 1253 (1975). Judge remarks seem to indicate that even the Seventh Circuit has a conflict

with the standard.

2. Plain error.

Defendant did not raise his objection to the District Court's jury instruction in his Opening Brief or in his Reply Brief. At trial Defendant, representing himself pro se, objected to the District Court's jury instruction on general grounds, but not on the specific grounds raised at oral argument at the Appeals Court level.

The Appeals Court determined they could not review Defendant's instruction unless it constituted plain error within the meaning of Federal Rule of Criminal Procedure 52(b). Relying on the recent Seventh Circuit opinion in United States v. Witvoet, supra, which the Court of Appeals claimed involved an almost identical problem, the Appeals Court held that plain error was not shown.

United States v. Bressler, slip. op. No. 84-2680 at 5. The Witvoet court dismissed the plain error issue on the strength of United States v. Moore, supra, stating that the mistake of law defense is extremely limited and the mistake must be objectively reasonable. Consequently, under the law of the Seventh Circuit, the instruction is proper and any trial court in the Seventh Circuit giving an instruction based on a recent Seventh Circuit Court of Appeals ruling cannot commit plain error. Witvoet, supra, at 340. In essence then, the Witvoet court began its determination of plain error with the proposition based on Moore, supra, that the instruction was proper and so did not constitute plain error which in turn meant the instruction could not be reviewed thus ending their review

where they started, with the proposition that the good faith jury instruction based on "objective" reasonableness was proper. This type of circuitous reasoning does not serve justice well as it ignores any inquiry into whether or not fundamental rights were infringed or exceptional circumstances exist placing the Defendant on a court fashioned treadmill with his liberty as the price.

After the Bressler court determined there was no plain error involved based on Witvoet, supra, they, nevertheless, went on to declare that for a jury instruction to constitute plain error the reviewing court must consider the entire record and determine whether the error in the District Court's charge had a probable impact on the jury's finding that the Defendant was guilty.

Bressler, supra, at 5. Here, the record shows that there was evidence of a good faith misunderstanding of the law if a "subjective" standard is used. This evidence involving Defendant's state of mind, can be found in Defendant's testimony [App., p.32], government witness Fitzhenry's testimony [App., p.38], government witness and special agent Schmidt's testimony [App., p. 42] and through Defendant's expert witness Joyce Jones [App., p.41]. Under the circumstances of this case then it becomes obvious that if justice is to be done any search for plain error must start with a finding as to which standard, the "objective" or "subjective" correctly represents the law in regard to a good faith misunderstanding of the law defense as established by this Court. See United

States v. Aitken, supra, at 194-195.

In addition to suggesting that when considering plain error in regard to jury instructions the instruction should be looked at as a whole , the Bressler court also claims that the Trial Court's correct instruction on willfulness would have negated an incorrect instruction on "good faith" if one existed because no other instruction other than the correct one on willfulness need be given. United States v. Pomponio, 429 U.S. 10, 97 S.Ct. 22. This conclusion was an improper statement of the law. Certainly it is naive to assume that prejudicial effects can be overcome by instructions to the jury. All practicing lawyers know this assumption to be an unmitigated fiction. (See Kruelwitch v. United States, 336 U.S. 440, 93 L.Ed. 790,

69 S.Ct. 716 (concurring Justice Jackson)).

The Bressler court, also, albeit weakly, advanced the theory that even if the Appeals Court ruled that the "subjective" standard should be used the jury instruction gien by the Trial Court would still be proper as the word reasonable was not preceded and modified by either the word "subjective" or the word "objective" and therefore the jury could have interpreted the instruction to include "subjective" reasonableness. The Appeals Court went even further and offended common sense by implying that a lay person would be more likely to believe the instruction meant they were to decide good faith based on what the defendant actually believed as opposed to what would be reasonable to believe if they

(the jurors) were in the Defendant's situtation (Bressler, supra, footnote 2) when the dictionary defintion of "reasonable" indicates the opposite would be expected from the lay person.

> Reasonable, adj. 1. capable of reasoning, rational. 2. Governed by or in accordance with reason or sound thinking. 3. Within the bounds of common sense. 4. Not excessive or extreme, fair, moderate. (emphasis mine)

"The American Heritage Dictionary of the English Language," American Heritage Pub. Co., Inc. Copyright 1970.

Even if the Appeals Court is correct and a juror could have read a subjective standard into the instruction, plain error would still exist.

> In considering an erroneous instruction it is generally assumed that the error influenced the result unless the record shows the result could not have been different.

Filippon v. Albion Vein Slate Co., 250 U.S. 76, 63 L.Ed. 853, 39 S.Ct.

435.

The foregoing is especially true when the error is based on a question of law bearing on issues of fact for the jury, and even more important when criminal charges are involved and incarceration is indicated. Sandstrom v. Montana, 442 U.S. 510.

The Bressler court creates another conflict in the circuits in regard to their ruling on the "objective" versus the "subjective" standard. The Aitken, supra, case is as on point if not more on point than Witvoet, supra, yet because the Aitken court adopted the "subjective" standard they had to find plain error. In Aitken, supra, the instruction reversed on was accepted by counsel at trial. The trial focused upon Defendant's intent and the evidence against the Defendant

was strong. Nevertheless, the Aitken court stated:

> We begin by noting the error was critical in the context of the case. The whole trial focused upon the defendant's claim that he actually believed he was not legally obliged to pay taxes... Even though the evidence against appellant was strong...we cannot say that no properly instructed jury could have reasonably aquitted him. Any doubt that we may have as to whether he was prejudiced by this error...must be resolved in his favor.

Aitken, supra, at 191.

The Trial Court improperly instructed the jury and the Appeals Court impermissably found the instruction proper while applying an incorrect method of determining whether or not plain error existed.

3. Reasons to grant certiorari.

The Court should grant Defendant's writ of certiorari as there is a conflict in the circuits in regard to

whether or not a "subjective" or "objective" standard should be used in determining if Defendant had a good faith misunderstanding of law defense in his criminal tax prosecution. There is also a conflict in the circuits regarding whether or not plain error occurs if an "objectively" reasonable standard is used in instructing the jury on good faith. Furthermore, Defendant's fundamental rights were infringed due to the Appeal's Court's acceptance of the "objective" standard of good faith and the Appeal Court's refusal to review the instruction based on the Appeal Court's erroneous ruling that plain error did not exist.

This Court should grant Defendant's petition as both Moore, supra, and Aitken, supra, are based on this Courts prior rulings in criminal tax cases.

Furthermore, as it stands now, criminal defendants are judged by radically different standards in criminal tax cases depending on which circuit their trials are held in. In a federal system this invites the real possibility of forum shopping and undermines the public's confidence in our judicial system and other federal institutions.

CONCLUSION

For these reasons, Petitioner prays that this court will Grant this Writ of Certiorari.

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 6, 1985

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. WILLIAM J. CAMPBELL,
Senior District Judge

UNITED STATES OF AMERICA,	)	
	)	Appeal from the United States
Plaintiff-Appellee,	)	District Court for the Northern
	)	District of
No. 84-2680 vs.	)	Illinois, Eastern Division.
	)	
HORACE E. BRESSLER,	)	No. 84 CR 20010
	)	
Defendant-Appellant.	)	Stanley J. Roszkowski, Judge.

ORDER

We have just received defendant's supplemental reply brief to the government's reply brief. The arguments therein are singularly unpersuasive.

* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is setting by designation.

Counsel compounds the error by misrepresenting as Seventh Circuit precedent a Northern District of Illinois opinion by Judge Shadur, United States v. Wojtas, 611 F.Supp. 118 (N.D. Ill. 1985). Contrary to counsel's statement, the Seventh Circuit has not "reject[ed] Moore, supra, and specifically embrace[d the First Circuit's opinion in] Aitken, supra" (Supp. R. Br. at 3). Judge Shadur's remarks appeared only in an appendix to the main body of his Wojtas opinion merely to illustrate a point, and were unrelated to the issue being decided. 611 F.Supp. at 122. However helpful these remarks might be were we considering in the first instance

the jury instruction approved by Moore, they do not address the issue before us -- whether the jury instruction given constituted plain error. Counsel would have been better advised to address Witvoet, which is relevant Seventh Circuit precedent and which the government brought to counsel's attention pursuant to Circuit Rule 11, in his supplemental reply brief than to make misleading references to the dicta in Wojtas. Therefore we adhere to our August 27 opinion herein.

APPENDIX B

Trial Testimony of Horrace Bressler

...I transferred a nouse that was boarded up at 726 North Winnebago. I transferred a property that had a fire in it at 1419 School Street and had not been repaired. It was in a partial state of repair, hadn't been occupied for years. I transferred the farm property in which we lived. I transferred a rental property that was occupied and producing rents at 848 West Locust Street, in Belvidere. I transferred my interest in the trailer at 8 -- I beg your pardon, 955 Ramona Terrace.

However, I did not transfer to Steven a property that was free and clear at 611 Avenue L, nor did I transfer a property to Steven or anyone else at 1206 West 6th Street, in Sterling, Illinois, nor did I in any way attempt to hide other assets.

For instance, there is a direct bill -- insurance check, which comes to what was then BDW Agencies from a company called Central Security Mutual Insurance Company out of Rolling Meadows. Those assets -- or that check, that agency part was in my name. Any assets that were there could have been attached, had there been a liability. I did not transfer that.

(TR Vol. II, p. 1121, lns. 4-24)

> Now, the reason for transferring these, these properties, is rather simple. I was approaching a period in life when you like to think you might be able to slow down. I had worked hard, and some had said I was burning the candle at both ends, as you've heard about, and I felt probably that might be true. Steve had just graduated recently from Belvidere High School. He had worked along with my brother and had a little taste of repair work, didn't have a job, and he went along with my brother for a time, and he became of the opinion he'd like to be a carpenter. He applied in Rockford for a -- what do you call it, a union, -- whatever it is that you get at the union to be a -- not a journeyman, but a -- whatever. He applied for that. This was during a period of time when there just wasn't any building of any size going on. So, he never got called, never had any work to do, and he was interested in this, and I thought it would be a good thing, and I guess maybe I pushed it off on him....

(TR Vol. VII, p. 1122, lns. 4-25)

> Then in 1971, in the process of getting through the mail, the Internal Revenue Service sent me the instruction packet for

the 1040, in 1971. I looked at the instructions and read it over several times. I didn't notice anything particularly, and then one day in reading it over, discovered something that was rather strange. It had there, "Every year Americans voluntarily file tax returns."

(TR Vol. VII, p. 1095, lns. 15-21)

...that "voluntary" meant without legal obligation.

(TR Vol. VII, p. 1095, ln. 25)

I would like these two documents -- this document is an original which I have filed in my file for these past years, and this is a photocopy of the page of a dictionary containing that definition. These documents form a foundation for my defense. There will be other supporting documents.

(TR Vol. VII, p. 1096, lns. 7-11)

"Each year American taxpayers voluntarily file their tax returns and make a special effort to pay the taxes they owe."

(TR Vol. VII, p. 1096, lns. 21-23)

"Voluntary - done, made, given, undertaken, entered into of one's own free will, not forced or compelled.

"Voluntary" -- and then it goes on -- "contribution."

(TR Vol. VII, p. 1097, lns. 1-4)

...I discovered that as I got other 1040 returns, I looked them over, and I discovered that there were other words in there that had significant meaning that the average man would not understand; they would pass right over them.

I was puzzled for a long time, because here on this 1040 for 1971 on the very first page, the instruction sheet, the Commissioner of Internal Revenue Service is saying that every year Americans voluntarily file their tax returns, and that meant something to me. "Voluntarily" means without legal obligation, and yet further into the booklet, it said -- into the instruction booklet, it said you must file.

It asked the question -- or makes the suggestion, Who must file.

I couldn't reconcile this for a long time. So, dumb as it may seem, I went to the dictionary to see what "must" meant. Sure enough, the dictionary meant -- said just what it seemed to say, and yet, there was this conflict.

How can this be?

And then it dawned on me that perhaps they're talking about a different kind of language than the language of the street, for the dictionary by and large is concerned with the language of the street, the language of the individual like you and I....

(TR Vol. II, p. 1098, lns. 1-24)

I do not know exactly what I said, but I do know from what he said I said in that meeting, Statement No. 1 was that I believed I would not have a tax liability, that my expenses would more than equal my income.

Later, as Mr. Schmidt pursued the investigation, I wrote him a letter I think in October of that same year, and I told him I did not -- that is was, I thought, fruitless for him to continue, simply because my expenses or my legal deductions would more than offset any income I would have.

You heard also in the -- let me back up a moment. During, as I recall, the document that Mr. Schmidt wrote from that interview in June, in Freeport, he stated there that I said I had no excuse for not filing an income tax return, and I said I didn't, and that's true, I had no excuse, he said other than the fact that

I was too busy. He never pursued that question or that line of questioning beyond that point. He never asked further whether or not there might have been other reasons. He stopped with that response.

(TR Vol. VII, p. 1118, lns. 1-18)

And in 1971, I learned that the Internal Revenue Service was calling it a voluntary tax.

(TR Vol. VII, p. 1127, lns. 21-22)

...how individuals are assessed their income taxes,...

(TR Vol. VII, p. 1100, ln. 14)

APPENDIX C

Trial Testimony of Fitzhenry.

...Did I or did I not, from your own article, relate the nontaxpayer as being one who had no liability?

A. You explained that people were not -- that the tax was voluntary in your interpretation.

Q. That's what I said?

A. Right. That was the thrust of your message that night.

Q. And did I explain why it was voluntary?

(TR Vol. II, p. 336, lns. 18-25)

A. Yes, you did, I believe.

Q. And what did I say as the reason why it was voluntary?

A. I don't recall your exact words. You talked about the IRS booklet, saying there were sections in the IRS booklet saying this was a voluntary tax.

Q. You do recall me saying that?

A. Yes, you did say that.

Q. That the Internal Revenue booklet stated that it was voluntary?

A. Government booklets, IRS publications.

Q. You do remember me say that?

A. I believe you said that.

Q. All right. If it is -- do you know what the word voluntary means?

A. Yes, I do.

Q. And what is your understanding as to what it means?

A. It means of your own volition.

Q. Without legal obligation?

A. Or, basically, any obligation.

(TR Vol. II, p. 337, lns. 1-19)

..."The IRS' response to Bressler's interpretation is that while income tax is voluntary...."
Who made that statement?

A. Which specific statement are you talking about?

Q. I'm talking about one, two, three, four, five, six -- the sixth paragraph down from the top on the first or the lefthand column, and I quote from your article:

"The IRS' response to Bressler's interpretation is that while income tax is voluntary...."

Who said that?

A. Well, as you read on further, it was said by a spokesman from the IRS, who also goes on to say that people have different interpretations.

Q. Well, what was his -- so, what you're saying is that Mr. Mike McGill was the IRS spokesman.

(TR Vol. II, p. 349, lns. 10-25)

Q. And he is the one that said it is what?

A. You just read it, sire. He said it was voluntary.....

(TR Vol. II, p. 350, lns. 6-7)

Q. Spokesman, an IRS spokesman in Chicago, Mike McGrail, told you that while income tax is voluntary -- he said it was voluntary did he?

A. According to my story.

(TR Vol. II, p. 350, lns. 12-15)

A. He talked about how paying taxes were voluntary....

(TR Vol. II, p. 325, ln. 16)

APPENDIX D

Trial Testimony of Joyce Jones.

> ...Then I figured the tax based on the tax charts and I did figure it at three exemptions, which would be 2,949.
>
> He had tax credits coming as determined by the Court of $5,290, which means he has a credit to carry over or back of 2,341. That's my calculations at this time.

(TR Vol. 7, p. 1213, lns. 20-24)

> Q. Now, Mrs. Jones, according to this worksheet, if Mr. Bressler had to -- had chosen to make and file an income tax return with the Internal Revenue Service, would he have had an income tax liability for the year 1978?
>
> A. No.
>
> Q. Would you say that good and loud?
>
> A. No.

(TR Vol. 7, p. 1214, lns. 12-18)

APPENDIX E

Trial testimony of Special Agent Schmidt.

> ...but because of the deductions he could take, he wouldn't owe any tax.

(TR Vol. 2, p. 360, lns. 13-14)

> Q. Did you have occasion at the end of this interview to ask him about gross income versus expenses?
>
> A. Yes. Mr. Bressler said that he believed he had sufficient gross income that would require him to file a tax return; but because of the expenses on his rental properties, he did not believe that he would have a tax liability.

(TR Vol. II, p. 368, lns. 20-25)

APPENDIX F

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was served by U.S. Mail, postage, prepaid, this 1 day of February, 1985, to:

KEITH C. SYFERT
Assistant U.S. Attorney
211 South Court St.
Rockford, Illinois 61101

JEFFREY L. SHROM

APPENDIX G

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Reply Brief has been served by placing two true and correct copies thereof in the United States mail, postage prepaid, this 18 day of April, 1985, addressed to:

GREGORY C. JONES
United States Attorney
ALEXANDER S. VESSELINOVITCH
Assistant United States Attorney
219 South Dearborn
Chicago, Illinois 60604

JEFFREY L. SHROM

APPENDIX H

CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY TO SUPPLEMENTAL BRIEF FOR THE UNITED STATES has been served by placing two true and correct copies thereof in the United States mail, postage prepaid this 15th day of July, 1985, addressed to:

Alexander S. Vesselinovitch
Asst. U.S Attorney

Charles B. Sklarsky
Assistant U.S Attorney
1500 Everett McKinley Dirksen Bldg.
219 S. Dearborn St.
Chicago, IL 60604

APPENDIX I

CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION FOR LEAVE TO FILE SUPPLEMENTAL REPLY BRIEF TO THE GOVERNMENT'S SUPPLEMENTAL BRIEF has been served by placing a true and correct copy thereof in the United States mail, postage prepaid, this 5th day of August, 1985, addressed to:

ALEXANDER S. VESSELINOVITCH
Asst. U.S. Atorney
CHARLES B. SKLARSKY
Asst. U.S. Attorney
1500 Everett McKinley
Dirksen Bldg.
219 S. Dearborn St.
Chicago, IL 60604

JEFFREY L. SHROM

APPENDIX J

REPLY TO SUPPLEMENTAL BRIEF OF THE UNITED STATES

...Rule 30 Fed. R. Crim. P. is a rule of general application and as stated in the government's brief is overcome in exceptional cases; or particular circumstances...where injustice might otherwise result, or on plain error principles (Government's brief, p. 3). Grossart v. Dinaso, 758 F.2d 1221, 1226 (7th Cir. 1985) (citing Hormel v. Helvering, 312 U.S. 552, 557 (1941) and Kessler v. Strecker, 307 U.S. 22, 34 (1939). The government then goes on to state that no injustice was done and before "plain error" principles can be involved, the merits of the case must be examined. The government's comments on the merits of the case all go to the factual ele-

ments of the case (i.e. that there was income and no return was filed) except for their conclusary statement that Defendant did not act with a good faith misunderstanding of the law, an issue of intent for jury to decide.

The fact is the first two issues could not really be disputed. The entire case revolved around Defendant's state of mind and the facts pointed out by the government actually support the assumption that Defendant did act in "good faith" if a "subjective" test is used, otherwise, it wouldn't make sense for Defendant to have been so open and public in regard to his beliefs and personal actions. Also, it's Black Letter Law that when a fundamental right is violated, such as a Sixth Amendment right to a fair trial, an injustice to both the individual and the system occurs.

In United States v. Aitken, 755 F.2d 188, (1st Cir. 1985) the court reaches the conclusion that in the context of that case the Defendant must be granted a new trial. The context's of the case in Aitken, supra, and here are on point. In both, the Defendant was labeled a tax protestor and in both the cases focused around the Defendant's belief he was not logically required to file tax returns....

C. ADDITIONAL COMMENTS OF IMPORTANCE.

As Counsel pointed out to the Court at oral argument the issue in question was not brought in the Defendant's briefs because Aitken, supra, was not available in the Missoula, Montana Law Library until research for the briefs was concluded as Aitken, supra, was not decided until February 25, 1985.

Counsel did not inform the Court of this case because he did not become aware of it until the briefs had already been filed and he was hundreds of miles from his office on May 21, 1985 in Federal District Court in Wichita, Kansas. Counsel was aware of this case at the conclusion of that hearing. Counsel caught the late flight arriving back in Montana approximately at 11 p.m. on May 22, at which time counsel read the case and on the morning of May 23rd counsel left Montana to fly to Rockford, Illinois and drove to Chicago the next morning for his 9 o'clock court appearance.

The Government's Supplemental Brief contains the answer as to why counsel had not argued this issue in his earlier brief on page five where the instruction in issue was approved

in Moore, supra, and additional cases following Moore, supra, as well as page 7 where the government rightly states that Moore, has been 7th Circuit law cited with approval for half a decade and at times arguments against Moore, have been characterized by this Circuit as meritless. Until Aitken, there was no case in any other circuit on point as to the wording of the instruction in issue.

Supreme Court, U.S.
FILED
DEC 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-734

In the Supreme Court of the United States

OCTOBER TERM, 1985

HORACE E. BRESSLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

Cases:

United States v. *Aitken*, 755 F.2d 188 ..... 3, 4, 5, 6

United States v. *Moore*, 627 F.2d 830, cert. denied, 450 U.S. 916 ..... 3, 5

United States v. *Phillips*, 775 F.2d 262 6

United States v. *Ware*, 608 F.2d 400 6

United States v. *Young*, No. 83-469 (Feb. 20, 1985) 5, 6

Constitution, statutes and rule:

U.S. Const. Amend. VI 3

26 U.S.C. 7201 2

26 U.S.C. 7203 2

Fed. R. Crim. P. 52(b) 4

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-734

HORACE E. BRESSLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court committed plain error in instructing the jury that "[a] good faith misunderstanding of the law may negate willfulness if the misunderstanding is reasonable (Pet. App. K63-K64)."[1]

1. Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts (Counts One and Three) of willfully failing to file tax returns for 1977 and 1978, in violation

[1]The petition appears to be untimely under Rule 20 of the Rules of this Court. The court of appeals issued its opinion and entered judgment on August 27, 1985, and the petition for a writ of certiorari was filed on October 28, 1985, 62 days after the court entered judgment, without a notarized statement from a member of the bar of this Court stating that it was mailed in timely fashion as required by Rule 28.2. The court issued a supplemental statement on September 6, 1985, but it does not appear that the supplemental statement affected the date of judgment.

of 26 U.S.C. 7203, and on one count (Count Two) of willfully evading substantial tax liability for 1978, in violation of 26 U.S.C. 7201. He was sentenced to five years' imprisonment and fined $10,000 on Count Two; to a concurrent sentence of one year's imprisonment on Count Three; and to a consecutive sentence of five years' probation on Count One. The court of appeals affirmed (Pet. App. K54-K78).

Petitioner, a tax protester, had substantial income from a variety of sources during 1977 and 1978. The evidence at trial established that petitioner received total gross income in 1977 of $102,871 and in 1978 of $150,578, and a government expert computed petitioner's taxable income in 1978 at $42,071, yet he did not file income tax returns for those years. Pet. App. K56-K57.

Petitioner conducted public meetings where he advised his audience that paying income taxes was voluntary and that he had not filed a tax return in 13 years. He stated that a person's chances of getting caught for failure to file tax returns is slim and that the American people are "dumb, dumb, dumb" for filing tax returns. He advocated several methods for avoiding income tax, including making oneself judgment-proof by transferring real property into trust and by removing assets from banks. In January 1981, petitioner transferred 10 of his own properties, including his house, to his son; each property was transferred for less than $100. Pet. App. K57-K59.

Testifying in his own defense, petitioner attempted to convince the jury that he believed that paying income taxes is voluntary. He said that in 1971 he read the Internal Revenue Service's Form 1040 instruction booklet and noticed that it stated that "[e]very year Americans voluntarily file tax returns" (Pet. App. B33-B34). Turning to his dictionary, petitioner discovered that "voluntary" means

"without legal obligation," so he concluded that he was not required to file tax returns (*ibid.*). Petitioner apparently chose to ignore that portion of the instruction booklet, which he acknowledged reading, informing taxpayers that they "must file a return or statement with us for any tax you are liable for" (Pet. App. B35-B36).

The district court instructed the jury that the government had to prove that petitioner had acted willfully. The court explained that "willfully" means the "voluntary and intentional violation of a known legal obligation" (Tr. 1355). It added that a "good faith misunderstanding of the law may negate willfulness if the misunderstanding is reasonable" (*ibid.*). Petitioner did not object to these instructions.[2]

2. The court of appeals rejected petitioner's argument that the district court committed plain error by instructing the jury that a good faith misunderstanding that is *reasonable* negates willfulness. Petitioner relied primarily on *United States* v. *Aitken*, 755 F.2d 188, 192 (1st Cir. 1985), where the court held that "the overwhelming weight of authority in the field of criminal prosecutions for failure to file tax returns and for tax evasion insists on a subjective standard for assessing wilfulness." The court here first noted (Pet. App. K64-K65) that Seventh Circuit precedent, particularly *United States* v. *Moore*, 627 F.2d 830 (1980), cert. denied, 450 U.S. 916 (1981), although not entirely clear, suggested that an objective standard is appropriate. But the court expressly declined to decide whether an objective or a subjective standard is appropriate (Pet. App. K65

---

[2]Petitioner represented himself at trial, refusing the assistance of court-appointed counsel. The court of appeals rejected his argument that the district court violated his Sixth Amendment right to counsel by refusing to let two nonlawyers represent him. Pet. App. K77-K78 n. 5.

n.1), holding instead that it did not have to decide that issue since "plain error has not been shown here" (*id.* at K66).[3]

The standard for judging plain error under Fed. R. Crim. P. 52(b), the court stated, is "whether the alleged error in the district court's charge had a probable impact on the jury's finding that the defendant was guilty" (Pet. App. K67; quotations omitted). There was no such impact in this case, the court held, because "the evidence clearly established that the defendant did not 'misunderstand' the law at all" (*id.* at K68). The fact that petitioner, "a sophisticated businessman with substantial real estate holdings," had advised people that their chances of getting caught for failing to file were slim and that they could avoid liability by making themselves judgment-proof, as he had done, showed "that he had no good faith, bona fide misunderstanding of the law, either subjective or objective" (*id.* at K68-K69). Rather, the court concluded, the evidence showed that petitioner disagrees with the law (*id.* at K69).

3. The decision below is correct and, contrary to petitioner's argument, does not conflict with the First Circuit's decision in *Aitken*. Accordingly, review by this Court is not warranted.

While there may be a conflict in the circuits on the question whether an objective or a subjective standard applies in criminal prosecutions of tax protesters, this case does not present that issue. The court of appeals here expressly declined to decide whether an objective or a subjective

---

[3]The court also noted (Pet. App. K70 n.2) that the instruction at issue did not speak of "objective" reasonableness or "subjective" reasonableness, but merely stated that a good faith misunderstanding that is "reasonable" negates willfulness. The court added that while lawyers ordinarily understand reasonable to mean "objectively reasonable," it is not clear that jurors do (*ibid.*).

standard should be applied (Pet. App. K65 n.1). Accordingly, while review may be appropriate if the Seventh Circuit continues to follow the statement in *Moore* that an objective standard is proper, this case presents no occasion to resolve any conflict.[4]

The issue presented here is whether the court of appeals erred in determining that the jury instructions were not plain error. And, as the court of appeals concluded, any error was not plain. In *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 14, this Court recently reiterated the rule that "only 'particularly egregious errors,' *United States* v. *Frady*, 456 U.S. 152, 163 (1982), those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings,' *United States* v. *Atkinson*, 297 U.S., at 160," are plain errors. Quoting *Frady*, the Court stated that "the plain error exception to the contemporaneous objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " *Young*, slip op. 14.

What occurred here does not come close to satisfying that standard. First, as the court of appeals noted (Pet. App. K70 n.2), it is not even clear that the jury understood that an objective standard was to be applied, since the instruction stated that a misunderstanding must be "reasonable" rather than "objectively reasonable." More importantly, as the court stressed, it is clear that petitioner would have been

---

[4]It is not clear that the Seventh Circuit will in the future adopt an objective standard. The court here noted that the Seventh Circuit's decisions have not been entirely consistent (Pet. App. K65 & n.1), as did the First Circuit in *Aitken* (755 F.2d at 192 & n.2). Petitioner suggests that "even the Seventh Circuit has a conflict" (Pet. 17), a claim that would support a suggestion for rehearing en banc — which petitioner did not seek in this case — in a case in that circuit properly presenting the issue. But disagreement within the Seventh Circuit does not warrant review by this Court.

convicted under either an objective or a subjective standard since the evidence plainly showed that he did not misunderstand the tax laws but instead disagreed with them. All courts recognize that disagreement with the law is not a defense. See, *e.g.*, *United States* v. *Phillips*, 775 F.2d 262, 264 (10th Cir. 1985); *Aitken*, 755 F.2d at 192 (quoting *United States* v. *Ware*, 608 F.2d 400, 405 (10th Cir. 1979)). Accordingly, there was no "egregious error" or "miscarriage of justice" here.

Petitioner suggests (Pet. 25-27) that the decision below is inconsistent with *Aitken* because the First Circuit found plain error in that case when the district court instructed the jury to apply an objective standard. However, there is no conflict. The First Circuit did not hold that such instructions were *per se* plain error. Rather, it held that the defendant in that case might have been prejudiced by the instruction (755 F.2d at 194). Moreover, this Court recently made clear that "a *per se* approach to plain error review is flawed" (*Young*, slip op. 15 n.14). Instead, "each case necessarily turns on its own facts" (*id.* at 15; quotations omitted). Thus there is no conflict between the First Circuit's decision that under the facts of *Aitken* the defendant was prejudiced and the court of appeals' conclusion that petitioner was not prejudiced.[5]

---

[5]There was no evidence in *Aitken* comparable to petitioner's statement that the chances of getting caught for not filing a tax return are slim, which clearly shows that petitioner understood that he was required to file a return. Moreover, the defendant in *Aitken* was a fireman (755 F.2d at 189), rather than a "sophisticated businessman" like petitioner. In addition, the instruction at issue in *Aitken* clearly stated that a good faith misunderstanding of the law must be "objectively reasonable" (*id.* at 190), unlike the instruction here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985